THE EXECUTIVE LEGISLATIVE AND JUDICIAL RECOGNITION OF INTERNATIONAL LAW IN THE UNITED STATES.

THE indefiniteness which attends both the concept and the content of what is known as international law will sufficiently explain why it is difficult to determine the exact relation which that body of law which regulates the conduct of states bears to the domestic law of each individual state. First of all, jurists are not agreed as to whether international law deserves to be called *law* in any real sense. The followers of the school of AUSTIN who restrict law to the category of commands imposed by a political superior upon a political inferior, naturally refuse to recognize the so-called international law as anything more than international morality. They look upon it as a system of rules more or less generally observed but lacking the effective sanction of laws imposed by a sovereign power upon its subjects. On the other hand, those who, with SAVIGNY and the school of historical jurisprudence, give a wider application to the term "law" and find in it the expression of the common will of a political community rather than of a command imposed by a political superior upon political inferiors, maintain that international law possesses the character of true law in as much as it consists of rules adopted by the common consent of nations and enforced largely by the moral sanction of public opinion.

Secondly, jurists are not agreed as to precisely what rules make up the body of international law. The Positivists insist that only those rules which are actually accepted by nations as binding upon them are to be considered as forming international law. Hence, according to them, a rule of international law must be based either upon custom, as representing the implied consent of nations, or upon treaties as expressing the declared consent of nations. The Grotians, as the followers of the school of GROTIUS have been called, regard international law as being made up not only of the rules actually in force between nations, but of certain others which, being based upon principles of morality, *should* be in force between nations, if they are not so. Thus WHEATON defines international law as "consisting of those rules of conduct which reason deduces, as consonant to justice, from the nature of the society existing among independent nations; with such definitions and modifications as may be established by general consent." While these authors are undoubtedly correct in holding before them the principles of justice as a standard by which to test the rules in force between states, they have frequently failed to distinguish between the abstract ideal rule and the actual rule in prac-

tice. The result has been that in their treatises they often obscure the facts of international relations.

With this warning of the different senses in which the term international law is used and with the observation that we are not here concerned with the obligations of the United States incurred by treaty with individual foreign powers, we may proceed to consider what place international law, as a general system, has in the municipal law of the United States. On this point we have the unanimous declaration of the executive, legislative and judicial branches of the Government that international law forms a part of the law of the land.[1] The assertion of this principle by the United States from the very beginning of its existence may be explained by the fact that international law had been repeatedly declared by the English courts to be part of the common law of England, which became the common law of the United States. This recognition by the United States that international law formed a part of the municipal law of the United States was not dependent upon any statute formally adopting international law into the general body of the laws of the United States. Rather it was due to the theory that in as much as international law was based upon the common consent of all civilized nations, it had received the implied consent of the United States, and was therefore binding upon the United States independently of any municipal legislation to that effect. In other words, to state the case as it was argued in later years by the United States against certain governments which seemed disposed to deny the duties imposed by international law, the adoption of the rules of international law and the recognition of the obligation to observe them formed one of the conditions of admittance into the family of nations.[2]

I.

Perhaps the most frequent way in which the rules of international law are recognized by the Executive Department of the United States Government is in the appointment of diplomatic and consular representatives of the United States to foreign countries. One of the oldest rights of a sovereign state is that of sending diplomatic representatives to other states and of receiving diplomatic representatives from them. Numerous rules have come to be observed regarding the appointment, duties and withdrawal of such diplomatic representatives, and these rules have a fixed place in the body of

[1] For a series of quotations and references illustrating the attitude of the several departments of the United States Government on this subject, see Moore, International Law Digest, Vol. I, Pages 1 to 11.

[2] For illustrations, see Ibid, Vol. I, Pages 5-6.

international law. A foreign state may refuse to receive, as the diplomatic representative of another state, a person who is *persona non grata,* though it would have to give some substantial reason for the refusal if it would avoid giving offence to the other state. Hence the state sending the diplomatic representative generally makes inquiries beforehand whether the person about to be appointed will be acceptable to the state to which he is to be sent. In like manner the Secretary of State of the United States, in appointing public ministers, takes account of the grades into which they have come to be divided. It would be more than a mere breach of social etiquette to send a minister, instead of an ambassador, to the Court of St. James. As for the public minister himself, while many of his duties are purely social, so that any remissness in the performance of them would not entail political consequences, the actual business of his office must be conducted under customary forms, which could not be departed from without giving offence to the state to which he is accredited. It is an encouraging sign of the growth of a saner and more liberal attitude in the relations of states that many of the struggles for precedence which formerly took place between ministers *en grand sérieux* would now be regarded as somewhat childish. Disputes on this point have not, however, entirely disappeared.

Consuls are not diplomatic agents, and accordingly their appointment is not governed by the rules relating to the latter; but in as much as they must be furnished with an *exequatur* by the foreign government to which they are sent before they can exercise their functions, and in as much as they enjoy certain privileges and immunities, though more limited than those of diplomatic agents, and have jurisdiction in certain defined cases, their position and functions are to that extent brought within the realm of international law.

In the negotiation and conclusion of treaties there are certain rules of international procedure whch cannot be departed from. Only a person formally commissioned by the United States could obtain access to the foreign office of another state for the purpose of negotiating a treaty. A *letter of credence* and *full powers,* identifying the agent of the United States and defining the extent of his authority, must be presented to the foreign government and accepted by it before the question at issue can be discussed.

The recognition of a new state, of the status of insurgency and of the status of belligerency, and the determination when a *de facto* government exists in cases where a new government has replaced an older one as the result of civil war, belong properly to the Executive Department of the United States. Likewise, it belongs to the Executive Department to determine when a state of war exists between

two foreign countries creating an obligation on the part of the United States to remain neutral to the conflict. This determination is generally attended by a proclamation of neutrality announcing the fact of such foreign war. While in these matters it is left to the discretion of the Executive Department to decide when the proper moment has come to take action, at the same time there are certain general principles recognized by nations defining the limits within which the Executive Department must keep in taking its decision.

In its protests to foreign governments regarding the treatment shown by them to American citizens, in its claims upon foreign governments for indemnification for injuries done to American citizens, in its diplomatic representations to foreign governments in cases in which the rights of the United States or the respect due to its ministers or to its flag are involved, in the settlement of these and of other questions too numerous to be set forth in detail, the executive department is guided not only by the treaties between the United States and such foreign state or states, but by the general principles of international law defining the rights and duties of the parties.

II.

The field in which the recognition of international law by the legislative branch of the United States Government may be manifested is much narrower than that in which the executive department applies the principles of international law. Cases requiring such recognition by the legislative department may be said to arise *occasionally,* rather than regularly, as is the case in the executive department. When a treaty which has been signed by the President and ratified by the Senate requires additional legislation before it can become effective, there is certainly a moral obligation upon Congress to pass the necessary legislation. This moral obligation rests chiefly upon the basis of the Constitution. The Constitution declares that all treaties made under the authority of the United States shall be the supreme law of the land, from which it follows that a moral obligation is imposed by the Constitution upon Congress of making effective a treaty which has been entered into by the President and Senate, who are empowered by the Constitution to act in such matters.[3] But if a case should arise in which the House of Representatives, while not disputing the right of the Senate and the President to conclude a given treaty, should, as a matter of legislative expe-

[3] This statement is made on the assumption, the rightfulness of which has been a subject of long-standing dispute, that the assent of the House of Representatives is not required to make a treaty valid, in other words, that the share which the House of Representatives has in such legislation as may be necessary to make a treaty effective does not give the House any right to reject the treaty as an international agreement.

diency, refuse to legislate as required, there would arise the obligation imposed by international law and based upon the principle of good faith between nations, of carrying out the stipulations of the treaty in question. A similar obligation would arise should the Senate, after ratifying a treaty, refuse its assent to the legislation necessary to render the treaty effective. So, also, there is an international obligation upon Congress to refrain from legislating in such a way as to impede the action of a treaty which is self-executing, or which imposes merely negative duties.

The recent Panama Canal Act furnishes an example of a case in which the sanctity of treaty obligation should have been recognized as imposing a limitation upon the legislative power of Congress. The debates in Congress prior to the passage of the bill do not suggest as great an anxiety as might be desired on the part of Congress, as a body, to keep the provisions of the act squarely within the terms of the Hay-Pauncefote treaty. But in a case of this kind, involving motives, it is difficult to say just how far what seemed an apparent indifference on the part of many Congressmen to the principle of the sanctity of treaty obligation may not be explained by the bona fide conviction of those persons that the obligations imposed by the treaty were not being violated by the legislation in question.

Another instance in which the principles of international law and the actual rules in force between nations must be taken into account by Congress is in the passage of what are called "Neutrality Laws." These laws are intended to give effect to the international obligation imposed upon a state to prohibit any acts on the part of persons within its jurisdiction which might compromise its position as a neutral in a war between two foreign powers. The Act of April 20, 1818, represents the present law of the United States on this subject. Both this Act and the earlier Act of 1794 were framed with a deliberate effort to meet the international obligations of the United States.

It was in virtue of the privileges and immunities accorded to public ministers by the law of nations that the First Congress of the United States passed, on April 30, 1790, an act making it an offence against federal law to "assault, strike, wound, or imprison, or in any other manner infract the law of nations, by offering violence to the person of an ambassador or other public minister," and providing that any writ or process for the arrest or imprisonment of a public minister should be deemed void.

III.

An enumeration of all the cases in which the Judicial Department of the United States Government has taken account of international law and applied its rules to the decision of cases would lead us over

practically the entire field of international law. Many of these cases only call for the application of the principles of international law incidentally; that is to say, they deal with suits, prosecutions, etc., in which the question at issue generally turns on the necessity of modifying the application of the ordinary principles of private law by reason of the fact that the rights and obligations of the parties are affected by the connection, whether as an official or as a subject, of one of the parties with some foreign state, or by reason of the fact that the rights in question arose under the authority of some state whose existence as an international person or whose authority to grant such rights is in doubt. Other cases involve the assertion of rights acquired under treaties between the United States and foreign countries, or of rights existing under international maritime law; others involve the jurisdiction of consular courts and the jurisdiction of the United States over its merchant marine on the high seas and over the crime of piracy; while others still involve the rights of belligerent states over property captured from the enemy or, under certain circumstances, from neutral states.[4] It should be observed that it is only in cases where the court is not applying statute law, but is basing its decision upon the principles of international law as generally accepted, that the court can be said to be recognizing the existence of a body of international law independent of municipal law. Statutes of the United States and treaties between the United States and foreign powers take precedence of international law, and it is only in the absence of the former that a court will proceed to reach a decision by the application of the latter. In the case of the *"Paquete Habana,"*[5] Justice GRAY stated the case as follows: "International law is a part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations." Not a few of the cases commonly cited as illustrating the application of international law are in reality merely interpretations of legislative acts which bear upon international relations.

CHARLES G. FENWICK.

WASHINGTON.

[4] Instances of all these cases can be found in such collections as Snow's Cases and Opinions on International Law (1893), Scott's Cases on International Law (1902), Cobbett's Cases and Opinions on International Law (3rd Ed., 1909).

[5] 175 U. S., 677.